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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Petitioners*,

v.

FUNCTIONAL MUSIC, INC.

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

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No. 926

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Petitioners*,

v.

FUNCTIONAL MUSIC, INC.

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

The Solicitor General, on behalf of both the United States and the Federal Communications Commission, has petitioned this Court to issue a writ of certiorari to review the judgment entered on November 7, 1958, by the Court of Appeals for the District of Columbia Circuit. Respondent agrees that certiorari should issue to review this judgment, but it disagrees with petitioner's statement of the issue.

STATEMENT

Respondent is the operator of FM broadcast station WFMF in Chicago. Since 1949, WFMF has carried on a background music subscription service with what is known as a "simplex" transmission system. The regulation of the Commission which was reversed by the Court of Appeals required WFMF to terminate this service unless it installed a "multiplex" transmission system in which the background music would be shifted from the main carrier frequency on which it is now broadcast to an inferior subcarrier which could not be received on ordinary home sets.

The petition for certiorari sets forth the meaning of the terms "simplex" and "multiplex", the general nature of "functional music" operations such as that of WFMF, and a description of the proceedings below (Pet. pp. 2-7). Essentially, WFMF's operation is quite like that of other radio stations. Its primary program fare is music, but this is interspersed with news, religious and educational programs, station identification announcements and some advertising commercials (JA 198, 204, 207-209). Its transmission system is similar to that used by other FM stations; all of its programs can be heard on any ordinary FM set (JA 166, 200).

The essential difference is that most of the station's revenues come from subscribers who want the music programs, without the commercial or other announcements, heard in their offices, restaurants, factories, schools and hospitals. Since these programs can be heard on any FM set, subscribers are induced to pay for the service primarily because, on their sets, a special device which deletes the commercials and other

announcements is installed (JA 80). The result is the same as if a time clock or a boy had been employed by the subscriber to turn the receiver off every time an announcement was to be broadcast. Subscribers whose sets are turned on receive the same programs, at the same time, as the home audience. But subscribers' sets are automatically turned off whenever a commercial or other announcement is broadcast.

As the Court of Appeals recognized, WFMF's music programs have been highly popular with the Chicago home audience.[1] They include orchestral selections of a semi-classical and popular nature (JA 199). While WFMF at one time engaged in "storecasting" (Pet., p. 2), it no longer does so.[2] Its programs, as the Court of Appeals stated, are predominantly background music;[3] and its service is of the general type described in the petition as a "background music" service (Pet. p. 2).

QUESTION PRESENTED

Is a radio station which relies primarily upon revenues from subscribers (as distinguished from advertising sponsors) to support programs intended to be received by all members of the public who will listen (whether in their own homes or in the subscribers'

[1] Pet., App. A, p. 17, note 2: "Surveys conducted in 1955 show WFMF, during the evening hours, to be the most popular FM-only station, and the fifth most popular of all stations, in the Chicago area."

[2] Respondent notified the Commission on January 10, 1959 that the mandatory multiplexing requirement had rendered "completely uncertain" respondent's contract with Storecast Corporation of America for storecast operations (JA 265-266). Since that time, this contract has been terminated.

[3] Pet., App. A, p. 17.

places of business) "broadcasting" in the sense that its programs are "intended to be received by the public" within the meaning of Section 3(o) of the Communications Act?

ARGUMENT

Because an important question of statutory interpretation is presented, respondent does not oppose the issuance of certiorari. The question presented concerns the definition of "broadcasting" in Section 3(o) of the Communications Act which was the "touchstone" of the Commission's decision (JA 108, 132). Section 3(o) defines broadcasting as the "dissemination of radio communications *intended to be received by the public* . . ." (Emphasis added).

The Commission concluded that respondent's station WFMF was not "broadcasting" primarily because most of WFMF's revenues were derived from subscribers rather than advertising sponsors. This interpretation of the statute is important because it was the key to rules affecting a number of FM stations which provide background music to both home audiences and subscribers' establishments. It is also important to the regulation of other subscription services including "pay television". Section 3(o) of the Communications Act has never before been interpreted by this Court.

1. While not opposing certiorari, respondent does oppose petitioner's statement of the issue. The petition states that this case presents an important question concerning the "*power* of the Federal Communications Commission to regulate, by rules of general applicability, the use of the frequency modulation (FM) broadcast band for functional music opera-

tions . . ." (p. 7, emphasis added). No such question was decided by the Court of Appeals.

The issue which was decided below was simply one of statutory interpretation. The Court of Appeals held that the particular statutory basis upon which the Commission had attempted to support a regulation shifting subscription music services from a regular broadcast carrier frequency to a sub-carrier frequency which cannot be received on ordinary sets did not support that regulation. As already indicated, the "touchstone" of the regulation was the Commission's conclusion that the background music programs were not "intended to be received by the public . . .". (JA 132, 108) The Commission conceded that they were intended to be received by the home audience (JA 133, 147). It necessarily concluded that the audience in subscribers' stores and restaurants was not "the public". In essence, what the Commission did was to read the word "primarily" into the Act before the word "intended", and then conclude that respondent's service was not "broadcasting" because it was *primarily* intended for subscribers and therefore was not "*primarily* intended to be received by the public." (JA 133).

It was this interpretaitaon of Section 3(o) which the Court of Appeals rejected. In an opinion by Judge Bazelon (Danaher, J., dissenting), the Court said (Pet., App. A, p. 25):

> "[F]unctional programming can be, and is, of interest to the *general* radio audience. Petitioner, for example, has acquired a high degree of popularity with the Chicago free listening audience. Moreover, it receives substantial and growing revenues from advertisers specifically desiring to

reach that audience. In this light, a finding that the programming of petitioner and broadcasters comparably situated is not directed to, and intended to be received by, the public generally is clearly erroneous. Transmitted with the intent contemplated by § 3(o), such programming therefore has the requisite attributes of broadcasting."

Since the Commisison's decision was based on Section 3(o), the Court's opinion was limited to an interpretation of that section. There are, however, other provisions of the Communications Act upon which regulations applicable to subscription services could be and have been based.[1] The Court of Appeals did

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[1] See, e.g., Section 303 of the Communications Act, 47 U.S.C. § 303:

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

(a) Classify radio stations;

(b) *Prescribe the nature of the service to be rendered by each class of licensed stations* and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

• • • •

(e) *Regulate the kind of apparatus to be used* . . .;

• • • •

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference and to carry out the provisions of this Act: . . .

(g) Study new uses for radio, provide for experimental uses of frequencies and generally encourage the larger and more effective use of radio in the public interest.

• • • •

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . .". (Emphasis added)

The Commission's rules authorizing and regulating the use of broadcast frequencies for subscription television test operations are

not therefore "deprive the Commission of power effectively to regulate" these services as the Government suggests (Pet., p. 12). Indeed, the Court of Appeals' action was much like that of this Court in the first *Chenery* case.[1] As the Court of Appeals stated (Pet., App. A, p. 26):

> "Whether or not petitioner's functional music service may be barred as objectionable for reasons other than its supposed status as a non-broadcasting service is not before us. We merely conclude that the reasons which the Commission relies upon do not support its action in barring functional music. *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194 (1947). . . ."

For these reasons, the Court of Appeals did not deprive the Commission of power to regulate functional music operations.

Nor did the Court of Appeals substitute its judgment for that of the Commission in an area where the Commission's "assessment of technical evidence" and "cumulative experience" were important (See Pet., p. 8). The issue before the lower Court was a simple one of statutory interpretation: whether an intention to serve subscribers changed a service admittedly intended for the public from "broadcasting" under Sec-

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keyed particularly to the italicized statutory language quoted above rather than to Section 3 (a). The Commission specifically held that it had power to authorize and regulate subscription television transmissions *whether or not* such transmissions constituted "broadcasting". *First Report on Subscription Television*, 23 FCC 531, 536, 540 (1957).

[1] *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194.

tion 3(o) to something else. No technical expertise was necessary to decide this question. Therefore, as this Court has said, since "the Commission professed to dispose of the case merely upon its view of a principle which it derived from the statute and did not base its conclusion on matters within its own special competence, it is for us to determine what the governing principle is." *Federal Communications Commission* v. *RCA Communications*, 346 U.S. 86, 91.

2. Although the Court of Appeals' decision did not deprive the Commission of power to regulate functional music operations, it did remove the statutory foundation on which the Commission had erroneously based the mandatory multiplexing rule. This rule would have caused the termination of the subscription services carried on by respondent and others similarly situated, and deprived the public of music programs which have become highly popular in Chicago and many other cities. The reason for this popularity was well expressed by an unsolicited letter from WFMF's home audience (JA 22):

> "[T]he uniform excellence of your musical selections is indeed balm to ears coarsened by too many years of listening to assorted hucksters extolling the virtues of various and sundry soaps, cold remedies and what have you."

The Court of Appeals' decision is important because it permits the home audience to continue hearing services such as that of WFMF on ordinary sets without charge.

3. While the Court of Appeals' conclusion that background music stations are engaged in "broadcasting" does not deprive the Commission of *power* to regulate

such stations, it is of importance to the *manner* in which they are regulated, and to the potential growth of other subscription radio and television stations. The fact that background music stations derive a large portion of their revenues from subscribers was the key to the Commission's decision that they were not engaged in broadcasting.[1] For this reason, the Court of Appeals' decision in this case will be an important precedent when the Commission decides the question which has not yet been authoritatively resolved—whether subscription radio and television are "broadcasting" within the meaning of Section 3(o).[2]

A review by this Court of the issue of statutory interpretation decided by the Court of Appeals would present an opportunity for a determination that the medium of broadcasting need not continue to be the

[1] The Commission based its conclusion that functional music stations were not "broadcasting" on three practices which it said these stations engage in. As described by the Court of Appeals, these practices were "presentation of a highly specialized program format, deletion of advertising from subscribers' receivers, and exaction of a charge for these services" [Pet., App. A, p. 24]. Each of these practices was said by the Commission to illustrate the fact that functional music stations were geared primarily to serve subscribers (rather than advertisers) and therefore were not "broadcasting". (JA 109, 132-133) The Commission stated, for example, that "as demonstrated by the format adopted and apparently the station's source of revenues" service to subscribers was "the key to the overall operation." (JA 133; see also JA 109) It is thus clear that the fundamental difference which the Commission found to exist between functional music stations and other stations was the primary reliance of functional music stations on revenues from subscribers rather than from advertising sponsors.

[2] See *First Report on Subscription Television*, 23 FCC 531, 538, 540-542 (1957); *Subscription Television*, Hearings before the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., pp. 2-6, 8, 13, 15, 19-20, 27-28, 183-185 (1958).

captive of advertising sponsors but is free to seek support from other sources.

CONCLUSION

For these reasons, certiorari should be granted to consider the issue of statutory interpretation decided by the Court of Appeals.

Respectfully submitted,

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